2008

The Doctor's Company v. G. Gregory Drezga, MD; and Heidi J. Judd, personally and as the natural parent and guardian of Athan Montgomery, for an on behalf of Athan Montgomery : Appellant's Reply Brief

Utah Court of Appeals

IN THE UTAH SUPREME COURT

THE DOCTORS COMPANY, *Plaintiff and Appellant,* v. G. GREGORY DREZGA, MD; and HEIDI J. JUDD, personally and as the natural parent and guardian of ATHAN MONTGOMERY, for and on behalf of ATHAN MONTGOMERY, *Defendants and Appellees.*	)	Appellate Case No. 20080514

APPELLANT'S REPLY BRIEF

APPEAL FROM SUMMARY JUDGMENT ENTERED MAY 9, 2008 BY THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE WILLIAM W. BARRETT

Paul C. Burke
RAY QUINNEY & NEBEKER
36 South Main Street, Suite 1400
Salt Lake City, UT 84145-0385
Telephone: (801) 532-1500
Facsimile: (801) 532-7543

Appointed Attorney for Defendant-Appellee G. Gregory Drezga

Kenneth D. Lougee
David Biggs
STEELE & BIGGS
5664 South Green Street
Salt Lake City, UT 84123
Telephone: (801) 266-0999
Facsimile: (801) 266-1387

Attorneys for Defendant-Appellee Heidi J. Judd

Jaryl L. Rencher (#4903)
STUCKI STEELE PIA ANDERSON & RENCHER
299 South Main Street, #2200
Salt Lake City, UT 84111
Telephone: (801) 961-1300
Facsimile: (801) 961-1311

Attorneys for Plaintiff-Appellant The Doctors Company

IN THE UTAH SUPREME COURT

THE DOCTORS COMPANY, *Plaintiff and Appellant,* v. G. GREGORY DREZGA, MD; and HEIDI J. JUDD, personally and as the natural parent and guardian of ATHAN MONTGOMERY, for and on behalf of ATHAN MONTGOMERY, *Defendants and Appellees.*	)	Appellate Case No. 20080514

APPELLANT'S REPLY BRIEF

APPEAL FROM SUMMARY JUDGMENT ENTERED MAY 9, 2008 BY THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE WILLIAM W. BARRETT

Paul C. Burke
RAY QUINNEY & NEBEKER
36 South Main Street, Suite 1400
Salt Lake City, UT 84145-0385
Telephone: (801) 532-1500
Facsimile: (801) 532-7543

Appointed Attorney for Defendant-Appellee G. Gregory Drezga

Kenneth D. Lougee
David Biggs
STEELE & BIGGS
5664 South Green Street
Salt Lake City, UT 84123
Telephone: (801) 266-0999
Facsimile: (801) 266-1387

Attorneys for Defendant-Appellee Heidi J. Judd

Jaryl L. Rencher (#4903)
STUCKI STEELE PIA ANDERSON & RENCHER
299 South Main Street, #2200
Salt Lake City, UT 84111
Telephone: (801) 961-1300
Facsimile: (801) 961-1311

Attorneys for Plaintiff-Appellant The Doctors Company

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

This reply brief for Appellant The Doctors Company ("TDC") responds to the brief of appellee Judd ("Judd Br.") and to the brief of appellee Drezga ("Drezga Br.").

REPLY TO APPELLEES' STATEMENT OF THE CASE

Appellees Judd and Drezga have partially stated the case. A more complete account of the trial court proceedings appears in TDC's opening brief (p. 5-7).

REPLY TO APPELLEES' STATEMENT OF FACTS

Judd's Factual Statements

Some of the facts offered by Judd can be clarified. For example, Judd recites that following the malpractice verdict against Drezga in December 2000, "TDC, through *appointed* counsel," appealed. (Judd Br. p. 4 ¶ 13; italics added.) Actually, TDC's *retained* counsel (Mr. Slagle) appealed for Drezga in the malpractice case. *Judd v. Drezga*, 2004 UT 91, 103 P.3d 135. Drezga received "appointed counsel" (Mr. Burke) for this declaratory judgment case. *Burke v. Lewis*, 2005 UT 44, 122 P.3d 533. Court appointed counsel was not involved in the malpractice appeal.

Also, Judd asserts that when TDC offered in 2007 to refund Drezga's policy premium, Drezga's "appointed counsel refused the offer as untimely." (Judd Br. p. 5 ¶ 18.) In fact, the correspondence from Drezga's appointed counsel, declining that offer, makes no mention of untimeliness. (R. 2982-2983, Appx. 1 of this reply brief.)

Drezga's Factual Statements

Drezga (via appointed counsel) accurately observes that the record on appeal lacks certain factual information. Such missing information includes whether Drezga intentionally failed to cooperate in the defense of the Judd malpractice claim and became aware of this declaratory judgment lawsuit. (Drezga Br. p. 3.) Elsewhere, counsel speculates[1] on a variety of issues. [2]

TDC agrees that such facts have not been established and also asserts that such speculative claims were not properly preserved for this Court's consideration on appeal. They have not been established because sufficient formal discovery has not been done in this declaratory judgment lawsuit. The only case management order for this lawsuit was entered in April 2007. That order set deadlines for litigating the Judd-Drezga summary judgment motion, but did not set a discovery schedule. (R. 1900-1908, 1918-1921, Appx. 2 of this reply brief.) The lack of sufficient discovery, particularly with respect to TDC's non-cooperation claim, is one prominent feature of this appeal. (Opening Br. p. 39-43.)

In contrast, there is evidence properly before the Court that TDC would not have

---

[1] Reference to appointed counsel, Mr. Burke, is not meant to suggest any disrespect or criticism of him (or of Judd's counsel). Instead, it is used to simply clarify that the positions posed in Drezga's brief may not actually be Drezga's views, as he is absent from the case.

2 It is simply *speculation* to assert that a) reversal of this case would likely leave Drezga without means to satisfy the judgment; b) Drezga relied upon coverage by TDC; c) Drezga may have misunderstood the insurance application questions; d) Drezga did not have sufficient command of the English language when he completed the application; e) TDC may have insured Drezga even if he had not misrepresented his malpractice history; f) Drezga had no reason to seek other insurance; g) Drezga practiced medicine believing that TDC would protect his interests and those of his injured patients; and h) Judd relied

issued Drezga a policy had he truthfully completed the application. (Opening Br. Zeiter Affidavit Appx. 6). Similarly, TDC refutes any inference in Drezga's brief that TDC did not propose tendering a refund of Drezga's premiums to Drezga's court appointed counsel, who declined receiving them on Drezga's behalf (*See e.g.* Drezga B. at pp 4 ("TDC has failed to repay the premiums...")).

Also prominent are questions of *law* regarding just what *facts* must be proven if TDC is permitted to proceed with its non-cooperation claim, its rescission claim, or both. (E.g., Opening Br. pp. 7-8, 23-29, 42-45.) Because this appeal arises from the May 2008 order of summary judgment *against* TDC, factual inferences and disputes related to that order should be indulged in favor of TDC. *See, e.g.*, *Harris v. Albrecht*, 2004 UT 13 ¶ 2, 86 P.2d 728, 729.[3]

REPLY ARGUMENT

Introduction

TDC seeks judicial relief from any obligation to defend or indemnify Drezga, based upon contractual rights that are plainly expressed in Drezga's malpractice policy and in his application for that policy. While it is understandable that appellee Judd (whose child was injured by Drezga) opposes TDC's claims for relief, Judd's tragedy does not empower her to re-write Drezga's malpractice policy. Nor is it sufficient for her to essentially suggest that this Court affirm this case due to sympathy for her child or

---

on the fact that Drezga was covered by malpractice insurance (Drezga Br. pp. 2, 4, 5-6)

[3]Where TDC appeals the denial of summary judgment in its favor, the factual inferences and presumptions run in Judd's and Drezga's favor.

because she (incorrectly) believes TDC was responsible for a tragedy (Judd Br. pp 33-34). Instead, the evidence properly preserved for this Court's consideration, plus the reasonable inferences or presumptions attendant thereto, demonstrate that Drezga, and not TDC, was solely responsible for Judd's unfortunate outcome. Indeed, had Drezga truthfully completed TDC's insurance application, TDC would not have insured him (opening Br. Zeiter Aff. Appx. 6), he would have thus likely been denied hospital privileges, and Judd would have had a different, competent physician, deliver her child – presumably without injury.

As for Drezga, it is properly presumed at this stage that he misrepresented his malpractice history when he applied for that policy. (Judd Br. p. 9, quoting May 9, 2008 judgment.) Additionally, because he disappeared, Drezga provided absolutely no cooperation in his own defense and the malpractice suit was tried to an "empty chair," with predictable result. Ironically, Drezga now assails TDC for asserting its plainly-stated contractual rights "against the empty chair of its insured." (Drezga Br. p. 8.)

Drezga *warranted* that the statements in his policy application were true. He was warned that he could lose coverage if he provided false information, and he *promised*, under the policy, to cooperate in defense of any claim against him. Drezga committed fraud in his application, and he breached his warranty and broke his promise. Under these circumstances Drezga is owed nothing by TDC, and Judd cannot claim greater rights, under the policy, than Drezga.

REPLY POINT ONE

THE TRIAL COURT'S "CANCELLATION WAIVED RESCISSION" HOLDING SHOULD BE REVERSED.

A. The Trial Court's Reasoning is Clear but Incorrect.

Judd, joined by Drezga, asserts that the trial court's "cancellation waived rescission" reasoning, in its May 9, 2008 judgment, "is clear." (Judd Br. p. 9; Drezga Br. p. 5 n.1.) However, the trial court's reasoning is also incorrect, particularly in light of the rule that on motion for summary judgment factual inferences must be drawn in favor of TDC, the opposing party on this issue. (*See Harris, supra*). The "totality of circumstances" does not support Judd's contention that TDC intentionally relinquished or waived its prerogative to seek rescission of Drezga's policy.

It is true that in June 2000, TDC took actions consistent with cancellation. However, TDC's July 2000 amended complaint is styled "Amended Complaint for Declaratory Relief *and Rescission*" (emphasis added). (Opening Br. pp. 11, 22, & Appx. 7.) In it, TDC alleges facts upon which the policy should be declared void and invokes Utah Code Ann. § 31A-21-303(10), which preserves the right to rescind a policy that is procured by fraud or misrepresentation. Thus the *totality* of TDC's actions, upon discovering Drezga's misrepresentations, squarely contradicts the trial court's conclusion that actions consistent with cancellation operated to waive TDC's requested alternative or additional remedy of rescission.

B. Cancellation and Rescission Are Both Permissible.

Judd and Drezga invite this Court to construe the policy's "rescind or cancel" language against TDC, to make those remedies mutually exclusive. (Judd Br. p. 10-12.) They seemingly invoke the rule that ambiguities in an insurance policy are construed in favor of coverage. *E.g.*, *LDS Hospital v. Capitol Life Ins. Company*, 765 P.2d 857, 858 (Utah 1988). However, they did not argue to the trial court, nor did the trial court hold, that the "rescind or cancel" language is ambiguous. Judd and Drezga also inconsistently argue that a "plain reading of the policy" supports their position. (Judd Br. p. 15.) In short, they make no coherent, preserved-for-appeal argument that the policy is ambiguous.

Were that argument properly before this Court, "it is axiomatic that a contract should be interpreted so as to harmonize all of its provisions and all of its terms, which terms should be given effect if it is possible to do so." *LDS Hospital v. Capitol Life*, 765 P.2d at 858. As explained in TDC's opening brief, the language in Drezga's policy regarding rescission and cancellation can readily be harmonized. Doing so permits TDC, or a similarly-situated insurer, to *prospectively* cancel a policy for *future claims* or risks, while also moving for judicial rescission, which acts both prospectively *and retroactively*. (Opening Br. p. 23-29.) Such harmonizing construction of the policy is reasonable and avoids ambiguity.

C. The TDC Policy is "Voidable."

Quoting *Continental Ins. Co. v. Kingston*, 2005 UT App 233, 114 P.3d 1158, Judd and Drezga stress that Drezga's TDC policy is "merely voidable, not void." (Judd Br. p. 14.) That is a distinction without a difference. TDC understands the term "voidable" to mean that the policy can be declared void, *retroactive* to its inception date, if TDC proves its allegations of fraud or material misrepresentation.

Judd and Drezga imply that TDC unilaterally "could have chosen to rescind" the policy once it discovered Drezga's misrepresentation. (Id.) Such choice would have been imprudent. TDC seeks rescission under common law, as permitted in Utah Code Ann. § 31A-21-303(10) (West 2008) (Opening Br. Appx. 1). Because rescission has *retroactive* effect it is typically sought via the courts. *See* L. R. Russ and T. F. Segalla, COUCH ON INSURANCE 3d § 31:65 (Thomson/West 2005) (cancellation is ordinarily accomplished by the parties; rescission is ordered in the first instance by the court).

TDC's non-cooperation claim was already before the trial court when TDC discovered Drezga's misrepresentation. An attempt to unilaterally rescind the policy would have been an improper attempt to "end run" the court's authority. TDC acted prudently by adding its rescission claim to its already-pending non-cooperation claim.

Recognizing that its claims might be denied, TDC took other actions to protect its interests so far as possible and reasonable, without judicial permission. One such action was to fund Drezga's defense in the malpractice case. Also, TDC *prospectively* cancelled Drezga's policy, under statutory procedures. Those actions were not intended to be, and

should not be construed as, intentional relinquishment of TDC's right to seek *retroactive* rescission. TDC ought not be punished for exercising its lesser remedy of cancellation, and for attempting to defend Drezga while concurrently seeking a judicial declaration that his policy is void.

D. Premium Refund is Not a Prerequisite to Judicial Rescission.

Judd criticizes TDC for not offering to refund Drezga's policy premium until 2007. (Judd Br. p. 16-17) Drezga also criticizes TDC for not refunding the premiums (Drezga Br. pp. 4, 10.) even though his appointed counsel refused them. (see Appx.1) Had TDC unilaterally declared Drezga's policy void, refused to defend the malpractice case, and retained his premium, (without later inquiring if Drezga's counsel would accept a refund of the same), Judd and Drezga would have a powerful argument. But rather than act in such imprudent manner, TDC funded Drezga's defense while simultaneously seeking a judicial declaration that the policy is void. As explained in TDC's opening brief, under these circumstances TDC's failure to more promptly offer a premium refund should not bar its claim for rescission. (Opening Br. p. 29-31.)

E. Denial of Motion to Amend is Not an Issue on Appeal.

Judd and Drezga ask this Court to affirm the trial court's denial, in its May 2008 judgment, of TDC's motion to file a second amended complaint. (Judd Br. p. 20.) That motion was motivated in part by TDC's desire to avoid confusion about use of the terms "cancel" and "rescind" in its July 2000 (first) amended complaint. (R. 2443, in Opening Br. Appx. 9.) TDC was imprecise in its use of both terms, as litigants and courts often

are. COUCH ON INSURANCE 3d § 30.3.[4] But TDC's first amended complaint plainly requests declaratory relief *and* rescission, and alleges legitimate grounds for rescission. Because the second amended complaint should not be needed for TDC to maintain its rescission claim, TDC does not burden this Court with the question whether the court erred in disallowing it.

REPLY POINT TWO

TDC's RESCISSION RIGHT WAS NOT ABROGATED BY JUDD's INTEREST AS AN INNOCENT THIRD PARTY.

Judd suggests that "public policy" supports "abrogation" of TDC's rescission right, based upon her interest as an innocent third party. (Judd Br. p. 24-25, 33.)[5] However, not only should "public policy" *instead* speak against an applicant lying on an insurance form, but Judd has also not answered TDC's arguments that such "abrogation" holdings are supported by *legislatively*-established public policy, and that no such support exists in this case. (Opening Br. p. 31-34). Two provisions of Utah's insurance code, wherein third party-based abrogation might logically appear, make no such provision. *See* Utah Code Ann. §§ 31A-21-105, 31A-21-303 (West 2008) (Opening Br. p. 34 & Appx. 1).

---

[4]Similarly, Appellee Judd appears to use the terms "rescission," "revocation," and "recession" interchangeably in her brief. (Judd. Br. pp. 8, 12, 15, 18.) The trial court's September-October 2000 ruling possibly also used the terms "rescission" and "cancellation" as if they were the same. (Judd Br. p. 20-21.)

[5]Drezga has not expressly joined this point of Judd's brief. Not knowing whether Drezga intends to do so, TDC replies to Judd's point as if she were the only one making it.

Judd has not identified, nor has TDC located, any published case wherein the abrogation of an insurer's rescission right has been judicially imposed *without* legislative support. *Ingrassia v. Medical Malpractice Ins. Ass'n*, 161 A.D.2d 685, 555 N.Y.S.2d 876 (N.Y. App. 2d Div. 1990), cited by Judd (Judd Br. p. 24), is also cited by TDC because in that case rescission was seemingly abrogated *based upon* legislative policy. (Opening Br. p. 37.) The "abrogation for third party interests" holding of *Aetna Casualty & Surety Co. v. O'Conner*, 8 N.Y.2d 359, 170 N.E.2d 681, 207 N.Y.S.2d 679 (N.Y. Ct. App. 1960) (Judd Br. p. 24-25), appears similarly grounded upon New York State's "Assigned Risk Plan" legislation for automobile insurance.

Again in the context of *automobile liability*, this Court has demonstrated that it will follow the legislature's lead in deciding coverage issues:

> The Utah *legislature* has enacted a comprehensive *statutory* scheme mandating minimum liability coverage for motor vehicles. . . . This *legislative* enactment reflects a public policy requiring vehicle owners to carry a minimum level of liability coverage *to protect innocent victims* of automobile accidents.

Speros v. Fricke, 2004 UT 69 ¶ 42, 98 P.3d 28, 36 (emphasis added; statutory citation omitted). Utah's legislature has not mandated liability coverage for medical malpractice. Lacking legislative support, Judd's intonation of "public policy," in support of the trial court's "abrogation" ruling, therefore rings hollow.

REPLY POINT THREE

THE TRIAL COURT'S MAY 2008 JUDGMENT ERRONEOUSLY DISMISSED TDC'S "NON-COOPERATION" CLAIM

As argued in its opening brief, TDC has a trial-worthy claim of non-cooperation by

Drezga. The trial court erred in its May 2008 judgment in effectively dismissing this claim. (Opening Br. p. 39-43.)

In response, Judd asserts that "[t]here are no witnesses that have come forward" to prove that Drezga's non-cooperation was intentional. (Judd Br. p. 27.) She implies that if this suit were remanded for proceedings on non-cooperation she would win summary judgment on this claim. Therefore, she argues "it would be a waste of time" to order such remand. (Id. p. 27-28; see also id. p. 30-31.) Similarly, Drezga argues that there is "absolutely no evidence in the record" to support TDC's non-cooperation claim under the "intentional non-cooperation" standard adopted by the trial court.[6] (Drezga Br. p. 7.)

Those arguments lack merit. Judd and Drezga are essentially asking this Court to grant summary judgment, in *their* favor, on the non-cooperation claim, without affording TDC sufficient discovery. They made no such motion in the trial court. Instead, Judd labeled the non-cooperation claim "tangential" in the papers supporting her motion for summary judgment, in which Drezga joined. (Opening Br. p. 40.) Therefore, Judd and Drezga have not preserved for appeal a motion to summarily dismiss TDC's non-cooperation claim.

Nor can they seek "appellate summary judgment" as an alternative ground to affirm the trial court's May 2008 judgment. A judgment *may* be affirmed on alternative

---

[6]As argued in its opening brief (p. 43-45), and reiterated in Reply Point Four of this brief, *infra*, the trial court adopted an incorrect "intentional and willful" standard to prove a non-cooperation claim. Accordingly, TDC disputes the argument in Judd's brief that TDC has ignored that requirement (Judd Br. At 27). If this Court agrees with TDC that such standard is incorrect, it should remand this case for entry of summary judgment for

grounds, "*if* it is sustainable on any legal ground or theory *apparent in the record.*" *Madsen v. Washington Mutual Bank FSB*, 2008 UT 69 ¶ 26, 199 P.3d 898, 905 (quoting authority; emphasis added). There is no record support for Judd's and Drezga's assertion that TDC cannot prove intentional non-cooperation. This is because, as observed earlier (*See* Reply to Appellees' Statement of Facts), formal discovery to bring such evidence into the record has not occurred.

This Court is not well-positioned now to receive and assess non-record evidence that may support or defeat TDC's non-cooperation claim. Therefore, Judd's and Drezga's argument for "appellate summary judgment" on this claim should be denied.

REPLY POINT FOUR

THIS COURT SHOULD CLARIFY THE STANDARDS FOR PROVING NON-COOPERATION.

A. No "Intentional and Willful" Requirement.

TDC should not be required to prove that Drezga "intentionally and willfully" breached his policy's cooperation requirement. It should suffice that Drezga's cooperation was diligently sought, yet not achieved. (Opening Br. p. 43-45.) Judd responds that other jurisdictions require that non-cooperation be intentional in order to justify relief to the non-breaching insurer. (Judd Br. p. 26-27.)

Judd relies on *Cincinnati Ins. Company v. Irvin*, 19 F.Supp.2d 906 (S.D. Ind. 1998), a case persuasive to the trial court. (Judd Br. p. 25-27; R. 512-513, in Opening Br. Appx. 8.) The facts in *Irvin* suggest that the court therein reached a proper result, but not

---

TDC on its non-cooperation claim.

because of its "intentional non-cooperation" reasoning. The non-cooperating alleged tortfeaser in *Irvin* was not the *policy holder* of the subject automobile liability policy. Instead, she was a *permissive user* of the automobile and an *insured party* under the policy's terms. 19 F.Supp.2d at 907-908. She disappeared after the underlying accident, and the insurance company invoked the cooperation requirement to deny coverage.

Had the court in *Irvin* granted relief to the insurer, based upon the *permissive user*'s disappearance, such result would have been manifestly unfair to the *policy holder*. There is no indication that the policy holder was un-cooperative with the liability defense necessitated by the permissive user's accident and no indication that the policy holder had any means of securing the permissive user's cooperation. The insurer's non-cooperation claim, if granted, would have left the policy holder uninsured for the permissive user's tort and disappearance.

No such unfairness is risked in this case for Drezga is *both* the tortfeaser *and* the policy holder. As the TDC policy holder he had clear notice of the cooperation requirement. As tortfeaser and policy holder he had control over his own cooperation. He plainly did not cooperate in his defense, and under the plain policy language such non-cooperation excuses TDC from defending or indemnifying him.

Drezga broadly argues that the purposes of liability insurance include the protection of "injured third parties." (Drezga Br. p. 8.)[7] As with Judd, he disregards the

[7]Drezga also seemingly broadly equates an insurer's duty to defend with its duty to indemnify (Drezga Br. p. 7-8), even though the former is broader than the latter. *E.g.*, *Fire Ins. Exchange v. Estate of Therkelsen*, 2001 UT 48 ¶ 22, 27 P.3d 555, 560.

specific TDC policy language in this case which unequivocally states that in event of a claim Drezga must cooperate in his defense or coverage will be lost. (Opening Br. pp. 42, 44; R. 2047-2048, in Opening Br. Appx. 3.) Judd and Drezga have not offered *evidence* to excuse Drezga's breach of that requirement, but only *speculation* that he may have vanished for reasons other than Judd's malpractice claim. Judd cannot claim greater rights under the TDC policy than Drezga can. *Thomas v. Otis*, 199 F.Supp. 1, 2 (D.D.C. 1961), *aff'd sum nom Nationwide Mut. Ins. Co. v. Thomas*, 306 F.2d 767 (D.C. Cir. 1962); *Goodner v. Occidental Fire & Cas. Co.*, 440 S.W.2d 614, 616 (Tenn. Ct. App. 1968). And Drezga cannot logically claim greater rights under the policy than any he would have had by cooperating in his malpractice defense. But, by glossing Drezga's non-cooperation with an "intent requirement," that is effectively what Judd and Drezga urge. Such gloss, unsupported by the policy and unsupported by contract principles, should be rejected.[8]

B. Reasonable Diligence.

TDC argues that as a matter of law it exercised reasonable diligence in its efforts to locate Drezga and to secure his cooperation in defense of the malpractice claim.

---

[8]Judd and Drezga are mistaken in their assertion that there is *no* evidence to prove that Drezga "intentionally and willfully" failed to cooperate. Given the circumstances of Athan's birth and injury, there is at least a fair inference that Drezga certainly had *reason to believe* that a malpractice claim was likely. Judd reports that he disappeared from Utah within two months of Athan's birth. (Judd Br. p. 2.) Viewed in a light favorable to TDC, that timing raises an inference that Drezga disappeared with the intent to avoid Judd's claim. Also, the "no knowledge of claim" rule espoused by Judd and Drezga seems unfairly broad. If Drezga had not known of Judd's claim, but disappeared to avoid consequences of other misconduct (for example, committing a crime), it is hard to believe

(Opening Br. p. 46-50.) Alternatively, TDC requests remand with clarification of what standard applies for proving such reasonable diligence. (Id. p. 50-52.)

Judd and Drezga do not respond to TDC's arguments regarding diligence. "[T]he brief of the appellee must contain the contentions and reasons of the appellee with respect to the issues presented in the opposing brief." *Brown v. Glover*, 2000 UT 89 ¶ 22, 16 P.3d 540, 545. Therefore, this Court should conclude that Judd and Drezga have either waived or defaulted their opportunity to argue on appeal the "diligence" element of TDC's non-cooperation claim. TDC refers the Court to its opening brief on the "diligence" question.

C. Prejudice.

Based upon the language of Drezga's policy, TDC should not bear the burden of proving prejudice caused by Drezga's non-cooperation. TDC recognizes that, in the context of automobile liability insurance, Utah case law is to the contrary. (Opening Br. p. 44.) TDC asks this Court to distinguish or overrule such authority based upon the language of Drezga's policy, the lack of a statutory requirement for such malpractice insurance, and the prejudice that naturally arises when a civil defendant is absent without explanation. (Opening Br. p. 52-56, citing authority.) Counsel who defended Drezga in the malpractice suit submitted an affidavit confirming this problem. "[I]t would be extremely difficult and prejudicial to the defense of a case such as this to go to trial with an absentee defendant/physician." (Aff. of David Slagle, R. 460-462, Appx. 3 of this

---

that such disappearance would not violate the cooperation requirement.

reply brief.) *See also Berry v. Truck Ins. Exchange*, 508 P.2d 436, 438 (Or. 1973) (en banc); *Glens Falls Indemn. Corp. v. Keliher*, 187 A. 473, 476-477 (N.H. 1936) (both noting prejudice due to absent defendant).

Judd acknowledges the paradox faced by TDC if it is ordered to prove prejudice caused by Drezga's non-cooperation. Without Drezga's presence TDC cannot establish what Drezga would have said or done to yield a defense-favorable result in the malpractice case. (Judd Br. p. 29.) Partially quoting a passage from *Irvin supra*, Judd nevertheless insists that TDC bears this impossible burden. (Judd Br. p. 29.) The complete passage in *Irvin* suggests *legislative* policy as the basis to so allocate the burden:

> An insurer facing the defense of a claim with an absent defendant might reasonably ask how it is supposed to prove that it could have had a better result in a trial if it had been able to locate a key witness whom it never manages to locate. *As discussed below, decisions from other jurisdictions offer additional guidance as to when a failure to cooperate might cause prejudice, but they do not necessarily offer much solace to an insurer that never locates the insured and is never able to offer proof of the testimony the insured could have offered if she had appeared for trial. In addition, it is important to keep in mind, as most state courts have when dealing with similar problems, that the automobile liability insurance policy is not a purely private contract. Such insurance is required by law to protect the interests of innocent third parties injured by the negligence of the insured person.* Thus, in the absence of collusion, most courts put the burden of proof, and thus the risk of uncertainty, on the insurer rather than on the person injured by the insured's negligence.

19 F.Supp.2d at 914 (the above-emphasized portion is not quoted in Judd Br. p. 29.) The above-emphasized and underlined language reveals that the "proof of prejudice" burden in non-cooperation claims is assigned to the insurer *via legislative policy*, namely in the context of *automobile* insurance, the context presented in *Irvin*. Utah has no such

legislative policy for medical malpractice insurance.[9]

Medical Assurance Co. v. Weinberger, 2007 WL 2915650 (N.D. Indiana, magistrate's order) (Judd Br. p. 28), *aff'd*, 572 F.Supp.2d 995 (N.D. Indiana 2008) does not compel assignment of the proof-of-prejudice burden to TDC. *Weinberger* is a medical malpractice case also featuring a vanished defendant. The magistrate's order cited by Judd, as well as the district judge's affirming order, cites the Indiana proof-of-prejudice rule from *Irvin*, *supra*. 2007 WL 2915650 *5; 572 F.Supp.2d at 1000. That rule, as already explained, arose in an automobile liability case, with legislative support that is lacking in this case.

The *Weinberger* orders do not quote the particular "cooperation requirement" language in the vanished physician's malpractice policy.[10] As previously explained, Drezga's policy plainly identifies cooperation as a requirement that the insured must satisfy. The policy also expressly states that the purpose of the requirement is to *avoid* prejudice. (Opening Br. p. 54-55.) The risk of unexcused non-cooperation therefore properly rests upon the non-cooperating insured (Drezga) and not upon TDC.

---

[9]The "collusion" concern in *Irvin* is that an insured might collude with a plaintiff to support the plaintiff's claim. 19 F.Supp.2d at 914. By statute, Utah forbids an insurer from colluding with its insured to avoid coverage. Utah Code Ann. § 31A-22-202 (West 2008) (Opening Br. Appx. 1). Neither type of collusion has been alleged in this case.

[10]The magistrate's opinion in *Weinberger* gives only passing reference to the cooperation requirement in that case: "This provision states that Medical Assurance has no duty to defend if the insured fails to 'cooperate with the company . . . in making settlement [and] in the conduct of suits.'" 2007 WL 2915650 p. 4 (ellipsis and brackets in court opinion). The magistrate's partial quotation of analogous policy language in *Weinberger* does not clearly reveal whether Indiana courts would similarly construe or re-write cooperation language such as that in Drezga's TDC policy.

Assuming that the burden of proving prejudice rests with TDC, Judd argues that TDC cannot possibly carry that burden because of the outcome of the malpractice case. The malpractice court directed a verdict for Judd on the issue of Drezga's negligence. On appeal, the absent Drezga did not challenge that directed verdict. *Judd v. Drezga*, 2004 UT 91 ¶ 8, 103 P.3d 135, 137. According to Judd, that negligence verdict now bars proof that Drezga's non-cooperation helped cause that verdict. (Judd Br. p. 29-30.)

If accepted, that circular argument would unjustifiably reward Drezga for causing the very prejudice that the cooperation requirement is expressly intended to prevent. (Opening Br. p. 54.) If accepted, that argument would grant to Drezga (and thus to Judd) greater recovery rights under the policy than would exist had Drezga complied with the cooperation requirement. If accepted, that argument would effectively eliminate the cooperation requirement from Drezga's policy.

That argument should be rejected and this Court should enforce the plain language of Drezga's policy. TDC diligently tried, without success, to secure Drezga's cooperation in defense of the malpractice suit. Absent proof of a legitimate excuse for Drezga's non-cooperation, TDC should be relieved of any further obligations on his behalf.

REPLY POINT FIVE

JUDD's CHALLENGE TO THE TIMELINESS OF TDC's CLAIMS SHOULD NOT BE HEARD ON APPEAL

Judd argues that TDC may have filed its claims too late. (Judd Br. p. 22-23.) Judd's "timeliness" arguments were never advanced in the trial court and lack record support. Therefore, they should not be heard on appeal.

A. Rescission Claim.

With respect to rescission, Judd acknowledges that "[t]he record does not disclose when TDC obtained information about Dr. Drezga's malpractice history." (Judd Br. p. 22.) TDC's amended complaint, adding the rescission claim, was filed on July 11, 2000. Earlier, on June 19, 2000, TDC had added rescission to its summary judgment motion and had filed its "Notice Seeking Termination of Coverage." (Opening Br. p. 10-11.) TDC's awareness of the grounds for rescission arose on or before June 9, 2000, when one of its officers, Todd Zeiter, executed his affidavit. (Opening Br. Appx. 6.)

Under Judd's new theory, TDC's rescission claim was not timely if TDC did not give Drezga notice thereof within sixty days after discovering that he had misrepresented his claims history. *See* Utah Code Ann. § 31A-21-105(5) (West 2008) (Opening Br. Appx. 1). That theory is problematic in light of Drezga's disappearance and unavailability to receive such notice. Regardless, Judd's "untimely rescission" theory cannot be decided on appeal because it was not raised in the trial court and the record contains insufficient undisputed facts to otherwise decide it.

B. Non-Cooperation Claim.

With respect to non-cooperation, Judd asserts that "[t]here is no question as to the timing of TDC's knowledge of Dr. Drezga's alleged non-cooperation." TDC "knew of Dr. Drezga's disappearance in 1997." Therefore, Judd argues that TDC's original April 2000 complaint, raising only the non-cooperation claim, was untimely. (Judd Br. p. 22-23.)

If that argument had been properly preserved for appeal it would likewise have to be rejected. Drezga's non-cooperation was an ongoing problem that could have ended had he re-appeared and helped to defend the malpractice lawsuit. He could have done so any time from his 1997 disappearance until December 2000, when the malpractice lawsuit went to trial. (Opening Br. p. 12.) His non-cooperation was effectively incomplete until the adverse verdict was entered in his absence.

TDC notified Drezga of its non-cooperation claim when, with leave of court, it served its original complaint by publication. (R. 44-46, Opening Br. Appx. 4.) That service was accomplished in approximately August 1999, well *before* the malpractice case went to trial (R. 703-716), and thus well *before* Drezga's non-cooperation was complete. It therefore appears impossible to prove that TDC's non-cooperation claim was filed too late. But if Judd insists upon attempting such proof, such attempt cannot begin on appeal.

REPLY POINT SIX

TDC SHOULD NOT BE COMPELLED TO PAY THE FEES OF DREZGA'S COURT-APPOINTED COUNSEL

Drezga asks this Court to affirm the trial court's April 2003 ruling that TDC pay appointed counsel's fees. He essentially attempts to re-write that ruling by asserting that "affirmance . . . would result in payments to Dr. Drezga's counsel *only after the successful defense* of Dr. Drezga's interests." (Drezga Br. p. 9; emphasis added.) The trial court's April 2003 ruling is *not* contingent upon Drezga prevailing against TDC. Instead, the court flatly ruled that "Defendant the Doctor's Company, consistent with

prior order of the court, pay the attorneys fees of Paul Burke for his representation of Defendant Drezga." (R. 1506, Appx. 5 of this reply brief.) The "prior order"— either a March 2003 Minute Entry, or a May 2001 Ruling (R. 1024-1025, 1496, also in Appx. 5) — also states no such contingency.

By adding the contingency that fee payment by TDC depends upon Drezga's "successful defense" in this declaratory judgment lawsuit, Drezga effectively invites this Court to deem him a "prevailing party," and to order payment of counsel's fees on that basis. But the general principle in Utah and the American tradition is that payment of prevailing counsel's fees, by the losing party to a lawsuit, is not permitted without statutory or contractual authority. (Opening Br. p. 59-60.) Drezga identifies no such authority, nor has he argued for any exception to this "principle" that each party bears its own attorney fees. Therefore, even if Drezga is a "prevailing party," TDC should not be ordered to pay his attorney fees.

Regarding "up-front" payment of appointed counsel's fees, Drezga disagrees with TDC's reliance upon *Travelers Indemnity Co. of Connecticut v. Mayfield*, 923 S.W.2d 590 (Texas 1996) (Drezga Br. p. 9-10.) Simply put, *Mayfield* appears to be the only known case that is reasonably on-point for this issue. TDC has located no contrary case law, and Drezga cites none. Thus while Texas law does not control Utah courts, *Mayfield* has persuasive value as apparently the only published case to address this issue.

Drezga's counsel also minimizes the concern that Drezga himself might not accept counsel whose up-front fees are paid by his adversary. (Drezga Br. p. 8-9.) Again,

Drezga's disappearance clouds this issue because "[a] lawyer shall not accept compensation for representing a client from one other than the client unless . . . the client gives informed consent . . ." Utah R. Prof. Conduct 1.8(f) *See also* Comment [11] to Utah R. Prof. Conduct 1.8 (acknowledging that third-party payers frequently have interests in limiting litigation costs). Thus while appointed counsel must exercise his own independent judgment, Utah R. Prof. Conduct 5.4(c)the reality is that there is tension, if not an outright conflict, between Drezga and his court-appointed counsel.[11] Because of that tension, acknowledged in the *Mayfield* decision, TDC should not be ordered to pay opposing counsel's fees.

REPLY POINT SEVEN

ISSUES NOT PROPERLY ADVANCED BY APPELLEES SHOULD NOT BE ADDRESSED ON APPEAL

Judd's and Drezga's briefs contain certain allusions that could conceivably be regarded as issues on appeal. However, their briefs include no statement of issues, nor any representation that such issues have been properly preserved on appeal by presentation to the trial court, as required by Utah R. App. P. 24(a)(5)(A)

Utah R. App. P. 24(c) directs TDC, on the one hand, to "answer[] any new matter set forth in the opposing brief." On the other hand, TDC has the prerogative to ignore any new issues raised in Judd's and Drezga's briefs, with the expectation that this Court will do the same. *See Brown v. Glover*, 2000 UT 89 ¶ 24, 16 P.3d 540, 545-546 (citing cases). However, if TDC "answers" such new issues they may be treated as though properly

[11] See *supra* footnote 1, p. 2)

presented on appeal. *Id.* (citing *Rome v. Commonwealth Edison Co.*, 81 Ill.App.3d 776, 36 Ill. Dec. 894, 401 N.E.2d 1032, 1034-35 (1980)).

Given the casual manner in which Judd and Drezga present certain "alluded-to issues," TDC asks this Court, in accord with *Brown v. Glover*, to disregard them because they were not properly raised in the trial court, and therefore TDC has not had sufficient opportunity to answer them. Such issues and speculative claims include whether: (a) Drezga's policy was delivered to him with the policy application attached (Judd. Br. p. 4 n.1); (b) TDC adequately investigated Drezga's claims history before issuing the policy (Id. p. 23-24, 33); (c) TDC breached its duty of good faith and fair dealing to Drezga (Id. p. 30); (d) Drezga can satisfy Judd's judgment without TDC's indemnification (Drezga Br. p. 2); (e) Drezga relied upon TDC coverage and believed his injured patients would be protected by TDC (Id. pp. 4, 6); (f) insurance companies, (instead of applicants themselves), are in the best position to investigate the applicants, and presumably the accuracy of the applicant's own representations (Id. p. 7); (g) Drezga misunderstood the application and lacked sufficient command of the English language (Id. pp. 5-6); (h) TDC would have issued a policy if Drezga had been truthful (Id. p. 6); (i) Judd relied on the fact that Drezga was covered by malpractice insurance (Id. p. 6); (j) (in contrast to automobile insurers) medical malpractice insurance companies, [who specifically tie coverage to truthful applications by licensed professionals not obligated by state law to carry such coverage], have an obligation to screen applicants (Id. p. 7); and (k) Utah law should provide incentive for insurers to screen professional liability insurance applicants

(Id.) *Judd and Drezga have not sufficiently "set forth," or "raised" those issues, as contemplated by the Court's rules or case law.*

The argument that TDC should have investigated Drezga's claims history is especially problematic from a procedural standpoint. Judd's own counsel executed an affidavit, in opposition to TDC's February 2000 summary judgment motion, in which he asserted that discovery was needed regarding that issue. (Aff. of James McConkie, R. 424-429, ¶¶ 7-8, 11-12, copied in Appx. 4 of this reply brief.) No such discovery has occurred. Therefore, there is no basis for an appellate ruling on this issue.

CONCLUSION

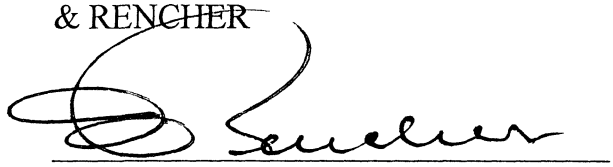
Contrary to suggestions by Judd and Drezga, this case is not about whether Judd's child deserves sympathy, whether TDC's litigation "punishes" him, or whether Drezga or Judd fairly relied upon TDC's coverage. Instead, this case is about Drezga misrepresenting material facts in his insurance application, and then failing, without excuse, to cooperate in the defense of the Judd malpractice claim. Drezga, not TDC, *both directly and indirectly*, injured Judd and caused this litigation. If issues of "public policy" are triggered, they should serve to punish individuals who defraud others in the formation of a contract. As such, TDC should have no obligation to indemnify Drezga.

For these reasons, and for the reasons in TDC's opening brief, the trial court's May 2008 judgment, its September-October 2000 ruling, and its order that TDC pay the fees

for Drezga's court-appointed attorney in this lawsuit should all be *reversed*. The case should be remanded for appropriate trial court proceedings, as requested by TDC.

RESPECTFULLY SUBMITTED this 13 day of April, 2009.

STUCKI STEELE PIA ANDERSON
& RENCHER



Jaryl L. Rencher
Attorneys for Appellant
The Doctors Company

CERTIFICATE OF SERVICE

I hereby certify that on the 13 day of April, 2009 I caused to be delivered by the method indicated below, a true and correct copy of this **APPELLANT'S REPLY BRIEF** to the following:

_____ VIA FACSIMILE
__✓__ VIA HAND DELIVERY
_____ VIA U.S. MAIL
_____ VIA FEDERAL EXPRESS

Kenneth D. Lougee
David Biggs
STEELE & BIGGS
5664 South Green Street
Murray, UT 84123
Attorneys for Heidi Judd, personally as the natural parent and guardian of Athan Montgomery

_____ VIA FACSIMILE
__✓__ VIA HAND DELIVERY
_____ VIA U.S. MAIL
_____ VIA FEDERAL EXPRESS

Paul C. Burke
RAY QUINNEY & NEBEKER
36 South State Street, Suite 1400
Salt Lake City, UT 84145
Attorneys for G. Gregory Drezga, M.D.

APPENDIX I

Law Offices
Epperson Rencher & Owens
A Professional Corporation
Crandall Building, Suite 500
10 West 100 South
Salt Lake City, Utah 84101
Fax: (801) 983-9808
erlaw@erlawoffice.com
Telephone: (801) 983-9800

David H. Epperson
Jaryl L. Rencher
Stephen W. Owens
Kevin S. Gardner
David C. Epperson

Second Century of Service
Founded 1895 as
Stewart & Stewart

August 13, 2007

Paul Burke
RAY QUINNEY & NEBEKER
36 S. State, #1400
Salt Lake City, UT 84111

Re: *TDC v. G. Gregory Drezga*
Our File No.: 99-136D

Dear Mr. Burke:

As you know, defendants Judd and Montgomery have raised the issue that TDC has yet to return unearned premiums to defendant Drezga as part of their rescission of the contract. Because no Answer has been filed by you to our Amended Complaint please advise if you are willing or have the authority from Dr. Drezga to hold or access those funds on Dr. Drezga's behalf.

Very truly yours,

EPPERSON RENCHER & OWENS

Jaryl L. Rencher

JLR/DCE:pm
cc: Patricia Shuler Schimbor, Esq.
Devin O'Brien, Esq.

7997

August 28, 2007

VIA FACSIMILE AND U.S. MAIL

Jaryl L. Rencher, Esq.
EPPERSON & RENCHER, P.C.
Crandall Building, Fifth Floor
10 West 100 South
Salt Lake City, Utah 84101

Re: *The Doctors' Company v. G. Gregory Drezga, et al.*

Dear Jaryl:

I am in receipt of your letter dated August 13, 2007. At this juncture, neither have I authority from Dr. Drezga nor am I willing on his behalf to accept the return of any premiums that your client might wish to tender as part of an effort to rescind its contract of insurance with Dr. Drezga.

I am also writing to confirm that you have graciously agreed to extend the time for Dr. Drezga to respond to your client's pending complaint and motions, including the motion to amend the complaint. I understand that you will provide me with notice of such time when you wish to receive responses from Dr. Drezga to these filings.

You are welcome to call me if you wish to discuss this matter.

Sincerely yours,

RAY QUINNEY & NEBEKER P.C.

Paul C. Burke

PCB/glw
942626

Paul C. Burke
ATTORNEY AT LAW

PO Box 45385
Salt Lake City, Utah
84145-0385

36 South State Street
Suite 1400
Salt Lake City, Utah
84111

801 532-1500 FIRM
801 323-3303 DIRECT
801 532-7543 FAX
pburke@rqn.com
www.rqn.com

APPENDIX 2

Original

07 MAR 29 PM 2:12

Jaryl L. Rencher #4903
David C Epperson #10229
EPPERSON & RENCHER, PC
Attorneys for Plaintiff The Doctor's Company
10 West 100 South, #500
Salt Lake City, UT 84101
Telephone (801) 983-9800

THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE DOCTORS' COMPANY, Plaintiff, v. G GREGORY DREZGA, MD; and HEIDI J. JUDD, personally and as the natural parent and guardian of ATHAN MONTGOMERY, for and on behalf of ATHAN MONTGOMERY, Defendants.	)	**(PROPOSED) CASE MANAGEMENT ORDER** Civil No 990904527 Judge Timothy Hansen

---

On March 14, 2007, Plaintiff by and through their attorney of record, Jaryl L. Rencher of Epperson & Rencher and Defendants Judd/Montgomery by and through their attorneys of record, James W McConkie of Parker & McConkie. a practice group of Prince, Yeates & Geldzahler, appeared before the Honorable Timothy Hansen upon an Order to Show Cause as to why this matter should not be dismissed Based upon the file and the representations of counsel the Court

essentially ordered that the parties submit a Case Management Order within 30 days. Based upon the foregoing Plaintiff hereby files with the Court a proposed Case Management Order:

1. Plaintiff the Doctor's Company represents that on or about November 28, 2003 it filed a **Motion to Serve Amended Complaint on Court Appointed Counsel, or in the Alternative Renew Motion for Leave to Renew Default Judgment.** Among other things Plaintiff intends to request a default judgment.

2. Defendant Athan Montgomery filed a **Summary Judgment Motion** on October 3, 2003 which is pending. The Plaintiff has filed a response.

3. The Honorable Judge Leslie Lewis previously entered an Order on March 24, 2004 stating that "The summary judgment will be heard after a determination by the Court of Appeals...Counsel will then contact this Court for a setting on the Motion for Summary Judgment and any other issues." See Exhibit A, "Docket" (emphasis added). The Court should schedule a hearing on Defendant Athan Montgomery's Motion for Summary Judgment at some time after Plaintiff The Doctor's Company's Motion to Serve Amended Complaint on Court Appointed Counsel, or in the Alternative Renewed Motion for Leave to Renew Default Judgment has been heard.

4. In part given the fact that 3 years has lapsed since Defendant Montgomery filed the Motion for Summary Judgment, Plaintiff has requested additional time to file a supplemental brief in opposition to Defendant's Motion for Summary Judgment. Plaintiff also now wishes to

submit additional argument and bases for relief. It is anticipated that Defendant will object to this intent. Further Defendants Judd and Montgomery have objected to the filing of supplemental briefs on Plaintiff's Motion for Summary Judgment and believe the same purpose could be accomplished through letters to the Court. Assuming this Court denies Defendant's Motion for default Plaintiff should be granted 10 days thereafter to supplement or otherwise respond to Defendant Montgomery's Motion for Summary Judgment and to file any additional argument. Defendant Montgomery will thereafter have the time to reply pursuant to this Court's rule and a hearing will be held thereafter.

5. If after the dispositive Motions have been decided, further discovery is necessary, the Court should then consider a more expansive Case Management Order.

DATED this ___ day of March 2007.

BY THE COURT

_____

Third Judicial District Court Judge

FILED

JAMES W. MCCONKIE, 2156
BRADLEY H. PARKER, 2519
PARKER & MCCONKIE, a practice group of
PRINCE, YEATES & GELDZAHLER
ATTORNEYS FOR PLAINTIFFS
175 EAST 400 SOUTH, SUITE 900
SALT LAKE CITY, UTAH 84111
TELEPHONE: (801) 578-3250

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

THE DOCTOR'S COMPANY, Plaintiff, vs. G. GREGORY DREZGA, M.D.; HEIDI JUDD personally and as the natural parent and guardian of ATHAN MONTGOMERY for and on behalf of ATHAN MONTGOMERY, Defendants.	**CASE MANAGEMENT ORDER** Civil No. 990904527 Judge ~~Timothy Hansen~~ Davis Barrett

On March 14, 2007 Plaintiff The Doctor's Company (TDC) by and through their attorney of record, Jaryl Rencher of Epperson & Rencher and Defendants Heidi Judd and Athan Montgomery, by and through their attorneys of record, James W. McConkie and Bradley H. Parker of Parker and McConkie, a practice group of Prince, Yeates & Geldzahler, appeared before the Honorable Timothy Hansen upon an Order to Show Cause as to why this matter should not be dismissed. Based upon the file and the representations of counsel the Court ordered that the parties submit a Case Management Order within 30 days. Based upon the

forgoing, Defendants Heidi Judd and Athan Montgomery hereby file with the court a proposed Case Management Order:

1. This matter was filed on March 27, 1999 and has been pending for eight years. The case has been up to the Utah Supreme Court twice.

2. Plaintiff The Doctor's Company represents that on November 28, 2003 it filed a Motion to Serve Amended Complaint on Court Appointed Counsel, or in the Alternative Renew Motion for Leave to Renew Default Judgment.

3. Defendant G. Gregory Drezga will have until April 9, 2007 to respond to Plaintiff's Motion to Serve Complaint on Court Appointed Counsel, or in the Alternative Renew Motion for Leave to Renew Default Judgment. Plaintiff The Doctor's Company will have five days within which to respond.

4. Defendants Heidi Judd and Athan Montgomery filed a Summary Judgment Motion on October 3, 2003 which is pending. The Plaintiff has filed a response.

5. Pursuant to this Honorable Court's ruling, the Defendants' Summary Judgment Motion should be heard forthwith. The Honorable Judge Leslie Lewis previously entered an order on March 24, 2004 stating that "The summary judgment will be heard after a determination by the Court of Appeals ... Counsel will then contact this court for a setting on the motion for summary judgment and any other issues."

(See Docket page 16, attached hereto as Exhibit A). However, in the event that this honorable court allows service of Defendant G. Gregory Drezga, in fairness, said Defendant should also have an opportunity to respond to Defendants Heidi Judd and Athan Montgomerys' Motion for Summary Judgment. Therefore, the court should schedule a hearing on Defendants Heidi Judd and Athan Montgomerys' Motion for Summary Judgment at some time after Plaintiff The Doctor's Company's Motion to Serve Amended Complaint on Court Appointed Counsel, or in the Alternative Renewed Motion for Leave to Renew Default Judgment has been heard and decided.

6. If after Defendants' Summary Judgment Motion has been decided, further discovery is necessary, the court should then consider a more expansive case management order.

7. Counsel for Defendant G. Gregory Drezga **does not** oppose this proposed Case Management Order. Counsel for Plaintiff The Doctor's Company **does** oppose this proposed Case Management Order.

DATED this 29 day of Mar., 2007

PARKER & McCONKIE, a practice group of
PRINCE, YEATES & GELDZAHLER

James W. McConkie
Attorney for Defendants

CASE MANAGEMENT ORDER

The Court, having reviewed the foregoing Proposed Case Management Order, and for good cause appearing hereby orders as follows:

1. Defendant G. Gregory Drezga shall have until April 9, 2007 to respond to Plaintiff's Motion to Serve Complaint on Court Appointed Counsel, or in the Alternative Renew Motion for Leave to Renew Default Judgment. Plaintiff The Doctor's Company shall have five days within which to respond.

2. After Plaintiff's Motion to Serve Complaint on Court Appointed Counsel, or in the Alternative Renew Motion for Leave to Renew Default Judgment has been heard and decided, Defendants Heidi Judd and Athan Montgomerys' Motion for Summary Judgment shall be scheduled forthwith for a hearing. However, Defendant G. Gregory Drezga will be given ample opportunity to respond to said motion before it is heard.

3. If after Defendants' Summary Judgment Motion has been decided, further discovery is necessary, the court shall then enter a more expansive case management order.

DATED this _____ day of _____, 2007.

_____
Honorable Timothy Hansen
Third Judicial District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 29 day of March, 2007, a true and correct copy of the foregoing **CASE MANAGEMENT ORDER** was sent first class mail, postage prepaid, to the following:

Jaryl Rencher
Epperson & Rencher
10 West 100 South, Suite 500
Salt Lake City, UT 84101

Paul Burke
Ray, Quinney & Nebekker
36 South State Street #1400
Salt Lake City, UT 84145

Amy Schauers

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE DOCTORS' COMPANY,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 990904527
vs.	:	
G. GREGORY DREZGA, MD; and HEIDI J. JUDD, personally and as the natural parent and guardian of ATHEN MONTGOMERY, for and on behalf of ATHEN MONTGOMERY,	:	
Defendants.	:	

This matter comes before the Court in connection with the proposed Case Management Orders filed by the plaintiff, The Doctor's Company, and defendants Heidi Judd and Athan Montgomery ("Judd defendants"). The plaintiff has filed an Objection to the Judd defendants' proposed Order and has also requested oral argument. Since the parties have adequately stated their positions and the issues presented are not dispositive, the Court declines to schedule this matter for hearing.

As a brief procedural history, the Court notes that Judge Lewis, the Judge originally assigned to this matter, issued a Notice for an Order to Show Cause hearing to be held on March 1, 2007. On that date, counsel appeared in front of Judge Hanson, who was temporarily assigned to this case. According to Judge Hanson's Minutes, Mr. Burke, who was previously appointed to represent defendant Dr. Drezga, was not present. At the

conclusion of the hearing, Judge Hanson directed counsel to submit a stipulated scheduling order, including a list of the pending Motions.

Instead of submitting a stipulated order, the plaintiff and the Judd defendants have submitted dual versions of proposed Case Management Orders. In reviewing these competing Orders, the Court notes that the principal difference between them is the inclusion, in the plaintiff's proposed Order, of supplemental briefing on the Judd defendants' pending Motion for Summary Judgment. The Judd defendants' Order provides that this Motion will be heard forthwith. There is also an issue as to whether defendant Dr. Drezga can respond to the pending Motions prior to his counsel, Mr. Burke, entering a formal appearance in this case.

After considering the parties' respective Orders, the Court determines that given the span of nearly four years since some of the pending Motions were filed, supplemental briefing is appropriate. Further, the Court notes that in her May 16, 2006, Court's Ruling, Judge Lewis indicated that Mr. Burke is relieved of any further obligation to locate and establish communication with defendant Dr. Drezga. Judge Lewis further ruled that Mr. Burke is authorized to proceed in providing Dr. Drezga the full scope of legal representation. In light of Judge Lewis' Court's Ruling, it is unnecessary for Mr. Burke to enter a formal appearance. Rather, Mr. Burke may proceed to file oppositions or supplemental briefs, as the case may be, with respect to the pending Motions.

Accordingly, after comparing the plaintiff's and the Judd defendants' proposed Orders, the Court concludes that the plaintiff's Order better reflects the ruling of the Court, particularly with respect to the issue of supplemental briefing. The Court will therefore enter the plaintiff's proposed Case Management Order, with the following additions and clarifications: Mr. Burke will have until May 10, 2007, to respond to the plaintiff's Motion to Serve Complaint on Court Appointed Counsel, or in the Alternative Renew Motion for Leave to Renew Default Judgement. The plaintiff will have five days after the filing of Mr. Burke's response to file a final reply. Either side may submit the plaintiff's Motion for decision.

Assuming that the Court denies the plaintiff's request for default judgment, the Court will proceed to consider the Judd defendants' Motion for Summary Judgment. Mr. Burke will have ten days from the date of the Court's ruling concerning the plaintiff's Motion to respond to the Judd defendants' Motion for Summary Judgment. The plaintiff may also file a supplemental opposition to the Judd defendants' Motion for Summary Judgment within that same time frame. The Judd defendants may then file a supplemental reply (or replies) and submit their Motion for Summary Judgment for decision.

The Court has entered the plaintiff's proposed Case Management Order on a date contemporaneous with this Minute Entry decision.

Dated this 25 day of April, 2007.

WILLIAM W. BARRETT
DISTRICT COURT JUDGE

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

APPENDIX 3

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

THE DOCTORS' COMPANY,

Plaintiff,

vs.

G. GREGORY DREZGA, M.D. and HEIDI J. JUDD, personally and as the natural parent and guardian of ATHEN MONTGOMERY, for and on behalf of ATHEN MONTGOMERY,

Defendants.

AFFIDAVIT OF DAVID W. SLAGLE

Civil No. 990904527

Judge Leslie Lewis

STATE OF UTAH)
:ss
COUNTY OF SALT LAKE)

David W. Slagle, being duly sworn, deposes and says:

1. That he is an attorney licensed to practice law in the State of Utah. That he is employed as a shareholder in the law firm of Snow, Christensen & Martineau and has been so employed for the past 32 years.

2. That he was retained by The Doctors' Company to represent Dr. Gregory Drezga in the lawsuit entitled *Heidi J. Judd personally and as the natural parent and guardian of Athan Montgomery for and on behalf of Athan Montgomery, Plaintiffs, v. Gregory Drezga, M.D. and Tooele Valley Regional Medical Center, Defendants,* Civil No. 980905603. That at the time he was retained by The Doctors' Company he was informed by Janet Burrows, Claim Representative

460

EXHIBIT
tabbies
3

for The Doctors' Company assigned to this case, that Dr. Drezga had left Tooele, Utah, had left the State of Utah, and The Doctors' Company did not know his whereabouts and had not been able to locate him. This Affiant was also informed, at that time, that The Doctors' Company was defending Dr. Drezga under a "Reservation of Rights" due to the fact that Dr. Drezga had not been located and The Doctors' Company might terminate its defense of Dr. Drezga pursuant to certain terms of its insurance policy.

3. After being retained by The Doctors' Company, this Affiant sent correspondence to Dr. Drezga at his last known address, and said correspondence was returned by the post office as being unclaimed with no forwarding address. This Affiant was informed by someone at either Tooele Valley Regional Hospital or Dr. Drezga's former office that Dr. Drezga had left the country and could not be located.

4. It is the opinion of this Affiant, based on long years of experience and practice in defending physicians who are involved in medical malpractice cases, that it is extremely difficult to defend a case where the defendant physician is not present at trial. This Affiant has defended at least two cases through trial where the defendant physician was deceased at the time of trial. In both cases, the trial was attended by the decedent's widow and, in one case, this Affiant also had the decedent's office manager present at the trial. In the professional opinion of this Affiant, it would be extremely difficult and prejudicial to the defense of a case such as this to go to trial with an absentee defendant/physician. In this Affiant's opinion, it would be much more prejudicial to the defense to defend a case such as the underlying case against Dr. Drezga in a situation where the defendant/physician was "missing" rather than a situation where the defendant/physician was

deceased Further, in the opinion of this Affiant, based on many years of practice and experience, it would be very prejudicial to go to trial in a malpractice case where the defendant/physician had never communicated with defense counsel and defense counsel had no explanation as to why defendant/physician had left the jurisdiction.

DATED this 10 day of July, 2000.

DAVID W. SLAGLE
Attorney for G. Gregory Drezga, M.D.

SUBSCRIBED AND SWORN to before me this 10 day of July, 2000.

NOTARY PUBLIC
Residing at: _____

My Commission Expires:

NOTARY PUBLIC
Marie Norton
10 Exchange Place, 11th Flr.
Salt Lake City, Utah 84111
My Commission Expires
February 11, 2002
STATE OF UTAH

462

APPENDIX 4

JAMES W. McCONKIE, A2156
BRADLEY H. PARKER, A2519
PARKER & MCCONKIE
ATTORNEYS FOR DEFENDANT
HEIDI JUDD PERSONALLY AND AS
THE NATURAL GUARDIAN OF ATHAN MONTGOMERY
4001 SOUTH 700 EAST, SUITE 115
SALT LAKE CITY, UTAH 84107
TELEPHONE: (801) 264-1950

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

THE DOCTOR'S COMPANY, Plaintiffs, vs. G. GREGORY DREZGA, M.D.; HEIDI JUDD personally and as the natural parent and guardian of ATHAN MONTGOMERY for and on behalf of ATHAN MONTGOMERY. Defendants.	**AFFIDAVIT OF JAMES W. McCONKIE** Civil No. 990904527 Judge Leslie Lewis

STATE OF UTAH)
:
COUNTY OF SALT LAKE)

James W. McConkie, being first duly sworn, deposes and states as follows;

1. I am counsel for defendants Heidi J. Judd and Athan Montgomery.

2. Plaintiff, The Doctor's Company, has filed an untimely summary judgment motion for the reason that neither side has had an opportunity to conduct discovery. The Utah Rules of Civil Procedure 56(f) provides that "Should it appear from the affidavits of a party opposing motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such order as is just."

3. Defendants Judd and Montgomery are unable to present essential facts to oppose the allegations in plaintiff's motion for summary judgment.

4. Plaintiff has not presented any evidence to support the proposition that defendant Dr. Gregory Drezga left this jurisdiction to avoid a law suit. Plaintiff has also not presented any evidence to show that Dr. Drezga is intentionally uncooperative.

5. Further discovery is needed to find persons who associated with Dr. Drezga who may have information about why he left the State of Utah. At this point in time, there is strong evidence that Dr. Drezga left the jurisdiction for personal reasons. Kaye Pratt signed an affidavit stating that she was the office manager at Dr. Drezga's office located in Tooele, Utah and worked for him starting sometime in June or July of 1996 and left his employment sometime in June or July 1997. She characterized her relationship as a professional one (office manager) and as a friend. She stated that she was not only familiar with Dr. Drezga's medical practice but some of his personal affairs as well. Affiant Pratt states that Dr. Drezga was receiving calls from creditors and that his patient load was decreasing. She also observed that he was anxious about family matters involving his wife and son who were living out of state. For these and other reasons specifically set forth in her affidavit, Affiant Pratt concluded that, "Dr. Drezga never mentioned to me that he as worried about a law suit of any kind or that he had intentions of leaving town due to fear of a law suit."

6. Further, discovery is needed to investigate the truth or falsity of the representations about prior law suits which may have been made by Dr. Drezga when he filled out his application with The Doctor's Company. For example, defendants should be given the opportunity to determine whether or not the prior malpractice claims mentioned in The National Practictioner's Data Bank are true.

7. Further discovery is needed on the part of the defendant to take the depositions of those in The Doctor's Company who have knowledge about why The Doctor's Company failed to take any action on the claim until August 10, 1999. This information is particularly pertinent because The Doctor's Company knew about the filing of the underlying lawsuit in this matter as early as September 16, 1977 and failed to take action for 11 months. Furthermore, The Doctor's Company failed to assert the defense that Dr. Drezga lied on his application until June 19, 2000, a year and nine months after The Doctor's Company was given notice.

8. Depositions are necessary to explore the reasons why The Doctor's Company did not discover the alleged misrepresentations on Dr. Drezga's application.

9. Further discovery is needed on the part of the defendants to take depositions to discover the reasons, if any, why The Doctor's Company failed to take any action to deny the claim, until August 10, 1999.

10. Further discovery is needed on the part of the defendants to discover the amount of premiums paid to The Doctor's Company by Dr. Drezga between the time of his initial insurance until time of termination of coverage.

11. Further discovery is needed on the part of the defendants to determine when The Doctor's Company received information regarding Dr. Drezga's alleged misrepresentation.

12. Further discovery is needed on the part of the defendants to determine the availability of information to The Doctor's Company which would have disclosed any misrepresentations on Dr. Drezga's application.

13. Further discovery is needed on the part of the defendants to determine if The Doctor's Company would have insured Dr. Drezga even in light of the alleged misrepresentations about his prior malpractice claims.

14. All of these issues are pertinent and relevant to the legal arguments raised by the plaintiff involving whether or not The Doctor's Company can retrospectively cancel Dr. Drezga's policy after a claim has been filed and whether or not The Doctor's Company is estopped from canceling the policy because too much time has past.

SIGNED AND SWORN TO this 7th day of July, 2000.

JAMES W. McCONKIE

SUBSCRIBED and SWORN to before me this 7th day of ~~June~~ July, 2000.

LISA ANN HOLLADAY
Notary Public
State of Utah
My Comm. Expires Mar 26, 2002
4001 S 700 E Suite 115 SLC UT 84107

Notary Public

APPENDIX 5

JAMES W. McCONKIE, A2156
BRADLEY H. PARKER, A2519
PARKER & MCCONKIE
ATTORNEYS FOR DEFENDANT
HEIDI JUDD PERSONALLY AND AS
THE NATURAL GUARDIAN OF ATHAN MONTGOMERY
175 EAST 400 SOUTH, SUITE 900
SALT LAKE CITY, UTAH 84111
TELEPHONE: (801) 264-1950

IN THE THIRD JUDICIAL DISTRICT COURT SALT LAKE COUNTY
STATE OF UTAH

THE DOCTOR'S COMPANY, Plaintiffs, **vs.** G. GREGORY DREZGA, M.D.; HEIDI JUDD personally and as the natural parent and guardian of ATHAN MONTGOMERY for and on behalf of ATHAN MONTGOMERY. Defendants.	**ORDER APPOINTING COUNSEL FOR DEFENDANT DREZGA** Civil No. 990904527 Judge Leslie Lewis

This present matter concerning the appointment of counsel to represent Defendant Drezga consistent with the prior order of this court came on regularly before the court for hearing on the 24th day March, 2003. Plaintiff The Doctor's Company was represented by Jaryl Rencher. Defendant Montgomery was represented by James W. McConkie and Bradley H. Parker.

Attorney Rencher, on behalf of his client, Defendant The Doctors' Company, noted for the record, as he previously briefed and argued in prior hearings before the court, his objection to the appointment of any counsel, but indicated no additional personal objection to the appointment of attorney Paul Burke Attorney Rencher represented to the court that The Doctor's Company had communicated to him that The Doctor's Company would not pay the attorney's fees of the court appointed counsel even if ordered by the court to do so and attorney Rencher requested that any appointed counsel be so informed

Having heard the arguments and representations of counsel, upon the pleadings on file herein, upon and consistent with the past orders of the court and being fully informed of the premises, IT IS HEREBY ORDERED THAT

1 Paul Burke, of the law firm of Ray, Quinney and Nebeker be and hereby is appointed as counsel for Defendant Drezga, and that

2. Defendant The Doctor's Company, consistent with prior order of the court, pay the attorneys fees of Paul Burke for his representation of Defendant Drezga

SO ORDERED this 8th day of March, 2003

SALT LAKE COUNTY - SALT LAKE ST DIST

Honorable Leslie Lewis

Approved as to form

Jaryl Rencher

1500

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused to be hand-delivered a true and correct copy of the foregoing this 4th day of March, 2005, to:

Jaryl Rencher
Vaun B Hall
EPPERSON & RENCHER
10 West 100 South, Suite 500
Salt Lake City, UT 84101-1566
Telephone: (801) 983-9800
Facsimile (801) 983-9808

Miriam Maxwell

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

DOCTORS' COMPANY, Plaintiff,	:	MINUTES LAW AND MOTION
vs.	:	Case No: 990904527 MI
G. GREGORY DREZGA MD Et al, Defendant.	:	Judge: LESLIE A. LEWIS Date: March 24, 2003

Clerk: chells

PRESENT

Plaintiff's Attorney(s): JARYL L RENCHER
Defendant's Attorney(s): BRADLEY H PARKER
JAMES W MCCONKIE
Video

HEARING

TIME: 10:08 AM The issue of apointment of counsel is before the Court.
The Court orders Mr Paul Burke is appointed to represent Dr G Gregory Drega to be paid by the Doctors' Co.
Mr Rencher objects to the payments from the Doctors' Co.
The Courts order will stand.
If necessary sometime in the future, and Mr Rencher believes the fees have become excessive, he may brief the issue and request a hearing.
Mr McConkie will prepare the order from this hearing.

1496

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE DOCTORS' COMPANY,	:	**COURT'S RULING**
Plaintiff,	:	**CASE NO. 990904527**
vs.	:	
G. GREGORY DREZGA, MD; and HEIDI J. JUDD, personally and as the natural parent and guardian of ATHEN MONTGOMERY, for and on behalf of ATHEN MONTGOMERY,	:	
Defendants.	:	

The Court has before it a request for decision filed pursuant to Rule 4-501 of the Code of Judicial Administration in connection with the plaintiff's Motion for Clarification or in the Alternative, Motion to Extend Time to File Notice of Appeal Pursuant to Rule 4(e) (the plaintiff has actually filed a Motion for Order Nunc Pro Tunc; Motion for Clarification of Court's Ruling on the Issue of Service in Light of Attached Affidavit and Motion for Rule 56(d) Clarification). The plaintiff has also filed a pleading seeking Clarification and Correction of Plaintiff's Memorandum in Support of Motion for Summary Judgment. Having reviewed the moving and responding memoranda with respect to the pending Motions, the Court rules as stated herein.

The essence of the plaintiff's Motions is that the Court's March 8, 2001, Court's Ruling, and subsequent Clarification of Court's Ruling, entered on March 13, 2001, are inconsistent with the Court's Order of July 8, 1999. The July 8, 1999, Order allowed the plaintiff to accomplish service of process by publication alone. This is incorrect.

The March 8 and March 13, 2001, Court's Rulings dealt with an entirely different issue: whether the plaintiff could obtain default judgment based solely on service by publication. In the recent Court's Rulings, the Court relied on Guenther v. Guenther, 749 P.2d 628, 629 (Utah 1988), which reiterated that "publication of summons **accompanied by** mailed notice sent to a last known address" met the constitutional standard for an "in personam judgment." (Emphasis added). Furthermore, while Rule 4 may no longer require both publication and mailed notice to the last known address, the Utah Supreme Court has determined that **both** are required for an in personam judgment.[1] This Court did not previously require both publication and mailed notice because this was the first time that the issue of a default judgment had arisen

[1] The Court cannot locate any rulings from Utah's appellate courts subsequent to Guenther which indicate that publication alone is sufficient for obtaining an in personam judgment. Therefore, the requirement of **both** publication and mailing set forth in Guenther is still the binding law in Utah.

in this context and the Court had not previously considered that Guenther specifically requires that both be accomplished for the constitutional standard to be met.

It now appears from the Affidavit of Janice Harrison that the plaintiff did in fact accomplish both publication and mailed notice to Dr. Drezga's last known address. Nevertheless, the issue still remains concerning whether this Court can enter default judgment when it has already determined that the plaintiff is not entitled to summary judgment as a matter of law. As stated in the March 8, 2001, Court's Ruling, the plaintiff was granted leave to renew its request for default judgment. However, when the plaintiff chooses to renew this motion, it must address whether it is substantively and procedurally appropriate for one to seek default judgment after denial of a Motion for Summary Judgment.

The plaintiff has also inquired about the finality of the Court's previous two Court's Rulings. A final determination of the plaintiff's Motion for Leave to Renew Service by Publication, and for Entry of Judgment has been postponed pending the plaintiff's clarification of the issue identified above and for retention of an independent counsel for defendant Drezga (see discussion below). The March 8, 2001, Court's Ruling was an Order denying only the defendant's Motion that the Court reconsider its Memorandum Decision, dated September 15, 2000.

Finally, the plaintiff seeks an order "nunc pro tunc", essentially allowing service on defendant Drezga to be accomplished by mailing a copy of the Summons to Attorney David W. Slagle. It is not clear what purpose such an order would serve since Mr. Slagle has definitively stated that he does not now nor has he ever represented defendant Drezga in this matter and is unwilling to accept service on defendant Drezga's behalf. However, this brings the Court to another important matter, the defendants' Motion to Appoint Counsel. Although this Motion has not been submitted for decision under Rule 4-501, the Motion has been fully briefed and is now ripe for decision. After reviewing the moving and responding memoranda with respect to this Motion, the Court agrees with the defendants that defendant Drezga does not have adequate representation in this matter. In addition, defendant Drezga, as the insured, is in an adversarial position with the plaintiff, his insurer. Under the Utah law alluded to by the defendants in their moving papers, the plaintiff is required to retain independent counsel to represent defendant Drezga in this matter. New counsel

must be identified and on-board within 30 days of the date of this Court's Ruling.

Dated this 22nd day of May, 2001.

LESLIE A. LEWIS
DISTRICT COURT JUDGE